Review Office
Freedom of Information and Protection of Privacy Act

Submission to the Freedom of Information and Protection of Privacy Review Committee - February 14th, 2003

I welcome this opportunity to make a submission to the Review Committee and look forward to meeting with you. Your appointment may not have attracted a lot of attention among the public, but what you have been asked to do is vitally important to all citizens.

Let me first speak to the importance of Section 2 of the Act which provides its purpose: Full accountability to the public, to provide for the disclosure of all government information with necessary exemptions that are limited and specific, in order to facilitate informed participation in policy formulation. As well it provides for an independent review of decisions made by public bodies. (I will address the personal privacy aspects later.)

The Nova Scotia Court of Appeal in *O'Connor v.Nova Scotia* (2001), NSCA #132 said ".. it seems clear to me that the legislature has imposed a positive obligation upon public bodies to accommodate the public's right of access and, subject to limited exception, to disclose all government information so that public participation in the workings of government will be informed and that government decision making will be fair, and that divergent views will be heard." **"The Act should be interpreted liberally."** *O'Connor* believes the Act is "deliberately more generous" than other similar legislation in the country. The judge attaches much importance to the words "fully accountable".

In *Atlantic Highways v. Nova Scotia* (1997) 162 B.S.R. (2d) 27, Justice Kelly said "the past

decisions of this jurisdiction and other jurisdictions have supported the basic purpose of this legislation, to provide protection to certain specific information that deserve privacy, and then to ensure the public has the information necessary to make an informed assessment of the performance of its government institutions".

More recently, on January 24, 2003, the Supreme Court of Nova Scotia in *Chesal v. Attorney General of Nova Scotia* (2003) NSSC 010, repeated the views in *O'Connor*, when it ordered the release of a tribal police force audit. I recommended disclosure of the same report in my Review, FI-01-92.

Justice Kelly, in *Dickie v. Nova Scotia (Department of Health)* (1998) N.S.J. No. 174 described this *Act* as "an important part of the democratic process".

The Nova Scotia Supreme Court, the Nova Scotia Court of Appeal, the Supreme Court of Canada, and the Federal Court of Canada have issued rulings clearly supporting openness and accountability in government.

Mr. Justice La Forest, the distinguished former Supreme Court Justice, addressed the underlying value of FOI laws in *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th).

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure, first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. Parliament and the public cannot hope to call the government to account without an adequate knowledge of what is going on; nor can they hope to participate in the

decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view. Access laws operate on the premise that politically relevant information should be distributed as widely as possible.

I ask that the Review Committee remember Justice La Forest's words, and the views of our own Supreme Court as they consider improvements to this legislation.

I hope you will receive many representations from interested Nova Scotians. I trust you will be convinced that you cannot have good government and good administration without openness, transparency and an informed public.

I firmly believe that this legislation provides all of the protection public bodies and local public bodies need in the way of exemptions to disclosure. It is no surprise that some public bodies find this Act awkward for them but this might be more a function of their record management systems and lack of adequate resources provided to the FOIPOP process. Of course there is a price tag attached to ensuring transparency, but it's a cost well worth bearing.

Some in the private sector argue that Section 21 as it stands interferes with their ability to keep their commercial, financial and other information from competitors. It is my view the Act properly recognizes that the private sector cannot expect to do business with the government (with the taxpayers) without having to publicly disclose information they might otherwise keep private. The Nova Scotia Supreme Court in the *Atlantic Highways* case confirmed this. Justice Kelly spoke of the right of citizens to be informed of the use of public funds. "The obvious danger," he said, "is the use of the protection of commercial information as a shield to keep from the public information necessary to properly assess government acts". I am satisfied that Section 21 (the third party exemption) protects the private sector from unreasonable public expectations as long as a third party

can show that the information being requested contains financial or commercial information which was provided in confidence and which, if disclosed, would reasonably be expected to do significant harm to its interests. Again I believe that protection to be adequate.

THE REVIEW OFFICER:

A little history of the Review Office may be helpful. I was first appointed to this office as a part-time member of the Utility and Review Board. There was no budget attached to the Review Office. It was supported through the "grace and favour"of the UARB. It became obvious, very quickly, that this job could not be done part-time. Fifty-four appeals were filed in the first nine months. That number more than doubled in my first full year in the job while I continued to work alone. However, the UARB was not a good fit for the Review Office because, as a public body, it could be subject to an appeal under this *Act*. I eventually was provided with a budget which allowed me to move into my own offices and hire two staffers. A recent amendment to the Act recognized that the Review Officer is serving "full-time".

Unlike Nova Scotia's Ombudsman and the Human Rights Commissioner, and unlike other information and privacy commissioners across the country, the Review Officer is not an officer of the legislature. I am the only provincial or federal information or privacy commissioner who is not an officer of the legislature. Establishing this office as a commission headed by an officer of the legislature will confirm its independence and recognize its importance. I have asked for this amendment to the Act.

The provisions for an independent review of decisions under FOIPOP are inadequate. I refer the Review Committee to the newest access and privacy legislation in the country, the Prince Edward

Island Act, particularly to Part 3 of that Act, which describes the office and the powers of the Commissioner. It reflects the wording in most access and privacy legislation in the country. As an example:

- The Lieutenant Governor in Council appoints the Commissioner on the recommendation of the Legislative Assembly;
- The Commissioner is an officer of the Legislative Assembly;
- The Commissioner submits a budget estimate to the Standing Committee of the Legislature.
- The Commissioner shall be remunerated as determined by the Standing Committee, and it shall review that remuneration at least once a year.

The Prince Edward Island legislature obviously found it to be essential that the Commissioner not only be independent but be seen to be independent.

You will note that the PEI Act gives the Commissioner the power to order a public body to disclose information. As an ombudsman I make recommendations to public bodies which they are free to accept or reject. It's understandable that many applicants, denied access even when the Review Officer recommends disclosure, would tend to believe that he should have the power to order the public bodies to disclose

I'm not privy to government thinking when it decided on the ombudsman model. I tend to favour this model for several reasons.

It's my view that "order powers" would "judicialize" the process, making it somewhat inflexible. It would become a semi-court with formal hearings, with both parties at the table. Public bodies would likely appear with their lawyers, leaving many applicants, without the funds to seek their own legal advice, at a considerable disadvantage.

"Order power" does not give a Commissioner the final say. Orders can lead to requests by public bodies for judicial reviews. The legal costs of judicial reviews to the Review Office would be substantial. It's budget would need to be increased considerably.

Finally, there is also no evidence that governments are more open when commissioners are given order powers.

One possible advantage would be that public bodies would be more amenable to settle during mediation. But I believe the ombudsman model works fairly well in Nova Scotia. The process is informal, the Review Officer is accessible to applicants and FOIPOP administrators alike and, as far as I can tell, the reviews and recommendations of the Review Officer are considered seriously by public bodies. The ombudsman model is efficient and cost effective. It provides individuals with an avenue of appeal, which used to be at no cost and should be again. The applicants receive an independent opinion provided without too much delay. Those opinions are made public and public bodies can be held to task for their decisions.

I suppose if most of the Review Officer's recommendations were rejected, the "orders" model would look more attractive.

PRIVACY:

You have been asked specifically to review the adequacy of the privacy protection provisions of the Act. I find that very encouraging. For several years now I have addressed this issue relative to lack of power for the Review Officer to investigate privacy complaints. Nova Scotians are awakening, like other Canadians, to their rights to privacy yet there is no independent legislated oversight in this Province to investigate privacy complaints.

That being said, most public bodies recognize that the mandate is implicit because the Review Officer provides independent oversight over the entire *Act*, including those sections addressing the protection, collection and use of personal information. I accept, investigate and report on privacy complaints but only with the cooperation of the public body. One local public body, Dalhousie University, has refused to cooperate in my investigations claiming I had no legislated mandate to do so. This is particularly unfortunate given the tremendous amount of personal information being held by such institutions.

However, some Government departments and agencies, and other public bodies and local public bodies have consulted me on their programs and policies with personal privacy implications. I have asked for an amendment to the *Act* to give the Review Officer the explicit mandate not only to investigate personal privacy complaints, but to be consulted by public bodies on any initiatives which involving the collection and use of personal information.

I believe that the lack of independent investigations of personal privacy complaints protection to be a major weakness in this legislation.

The language in the sections of the Act with respect to the collection, use and retention of personal information appear to offer adequate protection from the disclosure or misuse of personal information. But, in my view, the protection of personal health information is in a category of its own and deserves its own legislation.

I think we all agree that nothing is more important to individuals than the protection of their personal health information. At the same time, as the Canadian Institute of Health Research recognizes, Canadians have a passionate desire for a health system they can afford and rely on. I attended a CIHR workshop recently in which participants struggled with finding ways to respect the

fundamental values of what it described as the autonomy, dignity and integrity of the person, and the person's need for reliable health care.

Alberta, Manitoba and Saskatchewan have passed health information protection acts to complement other privacy legislation. Alberta's and Manitoba's Acts are in force. The Nova Scotia's Department of Health has a very able unit trying to reconcile personal privacy with improved health care.

I know you are aware that there exists federal legislation imposing the protection of personal privacy obligations on the private sector. It's called the *Personal Information Protection and Electronic Document Act* (PIPED) . The provinces are expected to pass their own private sector personal privacy legislation by January of 2004 or adopt the federal Act. Quebec has had such legislation since 1994. New Brunswick, British Columbia, Manitoba and Ontario have explored legislative options for regulating the collection, use and disclosure of personal information in the private sector. I am unaware of any intentions the Nova Scotia Government may have.

THE IMPORTANCE OF THIS LEGISLATION TO THE PUBLIC

Although many Nova Scotians appear unaware of this Act, and few people use it, it's importance has been demonstrated. To give one example, a spokesman for the employees of the Shelburne Boys' Home said publicly that all efforts to find out more information about accusations made against them were unsuccessful until they began asking for information under this Act. An application under the Act triggers a process, including a Review, that in this case was followed by some disclosure and a Supreme Court judgement..

This legislation is not only for the use of journalists, private enterprises, lawyers or

opposition caucus offices. Until recently the heaviest users have always been private citizens. But there are still relatively few Nova Scotians who appear to be aware of their rights under this legislation.

PUBLIC EDUCATION:

In other information and privacy legislation in the country, one of the commissioner's mandates is to educate the public. This does not appear in our Act and I believe it should. We have attempted to do it through media interviews and by way of our website. A clear mandate with modest funding would allow this Office to travel in the province to hold information sessions. Even with that mandate and the funds to travel, the Review Officer cannot take full responsibility for promoting this *Act*. The Minister responsible for the administration of this *Act* and the Department of Justice should play a major role in public education.

THE ROLE OF THE FOIPOP ADMINISTRATOR:

More on this subject will be included in my annual report to be submitted to the Legislature during its Spring session. The administrators should have the delegated power to make decisions. The positions should be filled by those with a demonstrated attitude of openness and transparency. Some of them may need, and should be provided with, necessary human and financial support. All of them need the moral support of their Minister, deputy Minister and senior officers. In the meantime, more training should be available to the new and inexperienced administrators.

PRO-ACTIVE POWERS:

Other similar legislation across the country mandates the commissioner to investigate and audit public bodies to ensure compliance with the *Act*. The Nova Scotia legislation requires the Review Officer to wait for a Request for Review. I have recommended an amendment to the *Act* to allow the Review Office to be pro-active. This power would likely be used only when there are reasonable grounds to do so.

FEES:

The increase in fees in April, 2002, discourages people from becoming engaged. It costs more to use this Act than any other in the country... quite a bit more. $25.00 to make an application under the Act for access to information and another $25.00 to file an appeal with the Review Officer. The amendment to the Act also increased fees for administering the Act (searching, processing, etc.) by $5.00 a half hour. The two free hours of processing was removed.

I expressed my views on the fee increase to the legislature's Law Amendments Committee. The fees may not deter businesses, law firms, journalists or the caucus offices, but it's reasonable to assume that it will deter private citizens, and volunteer citizens' groups, such as those interested in protecting their neighbourhood environment. As I pointed out earlier, private citizens and citizens' groups have been the most frequent users of the Act.

I can see no reason for the steep increase other than to discourage people from making applications and to provide some relief to the government. The money raised will do little to defer the costs of administering the legislation. There was some suggestion that the fees would stop frivolous applications. Except for one case I don't believe there were many applications that could be described as frivolous. And the increase will not impact on activities of that one applicant because

his requests are for his own personal information and no fees are applied to applications for personal information.

The Department of Justice produced financial figures showing the cost to government of administering the Act, but it is not clear to me how the figures were compiled. No one should have thought that the pledge of open and accountable government could be met without cost. The costs are a small fraction of the budgets of government, municipalities and the local public bodies.

By the time I meet with the committee I hope to have some statistics available to show what affects the fee increase has had.

RECOMMENDED AMENDMENTS TO THE ACT:

- that the Review Officer be given the mandate to investigate privacy complaints against public bodies and to issue reports and make recommendations.
- that public bodies be obliged to consult with the Review Officer with respect to the drafting and implementation of programs, policies and practices as they affect personal privacy.
- that the Review Officer be given the power, where there are reasonable grounds, to investigate and audit public bodies to ensure compliance with the Act. Under the Act as it stands the Review Officer can act only in response to a Request for Review.
- to further enhance the independence of the Review Office, that the Review Officer be appointed an officer of the legislation, a standing accorded to the Ombudsman and the Human Rights Commissioner, and that the Review Office be named a commission.
- The remuneration of the Review Officer be determined by a committee of the legislature.

- the Review Officer be mandated to engage in public education.
- that Section 47(1)(A) (see s.500 of the Municipal Act), which imposes a penalty for misleading an applicant, be amended to include a penalty for misleading the Review Officer.
- the Review Officer be provided with the power to delegate the right to review documents to the staff of the Office; and to have confidentiality oaths administered to the Review Officer and Staff. (This is in response to an occasion when a public body refused to provide the mediator with copies of the relevant records).
- that a clause be added to the Act to reflect the obligation placed on the Review Officer and staff not to disclose any information that comes to their knowledge in the performance of their duties. (See s.56 of PEI Act.)
- that Section 11 be amended to reinstate the clause giving applicants two free hours of processing time.
- that Section 6 of the Regulations be amended to reduce application fees to $5.00 and eliminate fees for a review.
- that Section 6 of the Regulations be amended to reduce the processing fees by $5.00 a half hour.
- that the Act provide the Review Officer with the power to comment on proposed access and privacy legislation.
- that the Act provide protection for the Review Officer, or any person working under the direction of the Review Officer, against criminal or civil proceedings for anything reported or said in good faith in the exercise of their duties.
- that the Act be amended to recognize the importance of the FOIPOP Administrator role and

their independence in performing their duties.

During your Review I hope you will remember Canadians, including Nova Scotians, have demonstrated they want to have more control over those who govern them, not just at election time. This *Act* is meant to meet those needs.

Thank you. I look forward to our meeting.

Darce Fardy, Review Officer